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No. 84-1951

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

THE SOUTHLAND CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF OF THE SOUTHLAND CORPORATION TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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Dated: September 26, 1985

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Petitioner The Southland Corporation ("Southland") respectfully submits this reply to the Brief of the United States in Opposition: [1]

1. To show the requisite specific "intent to impede and obstruct the functions of the Internal Revenue Service in the manner charged," *United States* v. *Tarnopol*, 561 F.2d 466, 474 (3d Cir. 1977), the prosecution had to establish Southland's

[1] In several key respects, the government's statement of the case neither finds support in the record nor accurately reflects the Court of Appeals' summary of the evidence.

There was, for example, no evidence at trial and no mention in the Court of Appeals' opinion of a conspiracy "to defraud the United States by concealing a bribe to *Mastropieri.*" (Opp. at 2.) (Emphasis added.) Similarly, there is no basis fact for the statement, "Mastropieri suggested that he

(footnote continues)

knowledge that some illicit tax consequence would flow from disguising the alleged bribe as a legal fee. In place of such a burden of proof, the Court of Appeals substituted the aphorism that "ignorance of the law is not a defense." (App. 11a.) The government studiously distances itself from that holding, never once attempting to defend it. The reason is clear. Other courts have held consistently that ignorance of the law is a defense to crime, like this one, requiring proof of specific intent. (*See* Pet. 8-9.)

In its effort to evade the Court of Appeals' holding, the government seeks to redefine the offense alleged. Intent to take an improper deduction, the government argues, was not essential because this prosecution was for conspiracy to defraud the United States in whatever manner. (Opp. at 5.) However, the indictment charged Southland with conspiring to defraud by claiming an improper deduction. Knowledge of the impropriety of the deduction is an essential element of such a conspiracy. Indeed, the acts illegal under the conspiracy to defraud provisions of 18 U.S.C. § 371 are those involving "deceit, craft or trickery, or at least means that are dishonest." *Hammerschmidt* v. *United States,* 265 U.S. 182, 188 (1924). These prohibited means necessarily presuppose knowledge of wrongfulness.[2]

The government's second effort to skirt the Court of Appeals' erroneous holding is no more successful. The govern-

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(footnote continued)

could resolve the sales tax dispute by bribing *members of the State's Tax Commission.*" (Opp. at 2-3.) (Emphasis added.) In fact, no bribe was ever paid or even offered to a public official and there is no indication in the record that Mastropieri or anyone else ever identified any potential recipient or recipients of an illegal payment. Additionally, there is no evidence—and the Court of Appeals' opinion does not reflect any evidence—that a bribe "proposal was discussed with *Southland's chief executive officer.*" (Opp. at 3.) (Emphasis added.) In fact, the District Court specifically ruled that Southland's chief executive officer was *not* a coconspirator.

[2] The government's attempts to distinguish *Ingram* v. *United States,* 360 U.S. 672 (1959), fall flat. The individuals found guilty of conspiracy to evade taxes in *Ingram* " virtually conceded" that they had conspired to conceal taxable income. *Id.* at 677. There was no such concession here. And the government produced no proof, as *Ingram* required, of knowledge by Southland that the government would be defrauded. *See id.* at 678-80.

ment attempts to show that Southland did in fact know that the Mastropieri fee would be deducted improperly.

In support of this contention, the government cites the Court of Appeals' observation that " 'there was evidence that Dole, DeFalco, Matthews and Davis were all very much concerned that the $96,500 was being improperly taken as a deduction.' " (Opp. at 5-6, quoting Pet. App. 11a.) This observation not only was inaccurate,[3] but is inadequate to show specific intent to defraud. The government, therefore, escalates the Court of Appeals' statement to a conclusion that "responsible officials of Southland *knew* that the payment would improperly be deducted on the corporation's tax returns." (*Id.* at 6.) (Emphasis added.) However, there is no rational basis for equating concern about a deduction's propriety with knowledge that the deduction was, in fact, improper.

The government appears nonetheless to attempt such an equation by arguing that suspicions coupled with lack of further inquiry is tantamount to actual knowledge. (Opp. at 5 n.4.) However, this argument—never made below—requires proof both that Southland was "aware of a high probability" the deduction was improper and that it did not "actually believ[e]" the deduction was proper. *See Leary* v. *United States,* 395 U.S. 6, 46 n.93 (1969). There was no such proof.

In sum, the Court of Appeals announced a controlling principle of law which is clearly wrong and which the government does not even attempt to defend. Instead, the government seeks to obscure that holding with factual irrelevancies and misstatements. In actuality, there is no obstacle to review of the

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[3] As previously noted, (*see* Pet. at 4 n.2), there is absolutely no basis in the record for the Court of Appeals' comment, repeated here by the government, that Matthews and Davis "raised the question [of the fee's deductibility] with outside counsel, but did not explain [to outside counsel] why the payment might not be deductible." (Opp. at 3.) The record showed only that Davis raised a question about deductibility of the fee; there was no further evidence of what Davis said to the outside counsel or what the outside counsel said to him. Nor was there any evidence that DeFalco or Dole were at all "concerned that the legal fee was being improperly taken as a deduction." (*Id.*)

Court of Appeals' ruling. This Court should correct the Second Circuit's error before it taints numerous conspiracy prosecutions in that Circuit and elsewhere.

* * *

2. The government suggests that the District Court properly applied two separate statutes of limitations to a single violation of Section 371 because doing so "would quite obviously have been proper had the two objectives been charged in separate counts." (Opp. at 7.)

If, as alleged, Southland was a party to a single conspiracy, then the government's arguments about what would have happened had the two objectives been charged in two counts of the indictment are mere sophistry. Splintering the charges in that manner "would have been subject to objection on grounds of multiplicity, the charging of a single offense in separate counts." *Sanabria* v. *United States*, 437 U.S. 54, 65 n.19 (1978).

In other words, if the prosecution *could* have framed a two-count indictment, then it *should* have done so. Rather than allege two separate crimes, however, the prosecution alleged a single crime, based on a single conspiratorial agreement. That one agreement can have but *one* penalty—and *one* statute of limitations. By flaunting this straightforward and logical proposition, the government needlessly confused the jury.[4] Particularly since the government contends that the same

[4] The government states that the Court of Appeals rejected the argument that the jury may have been confused. (Opp. at 9, citing Pet. App. 14a.) Of course, as previously noted, the Court of Appeals was itself confused when it attempted to perform the task that supposedly presented no problem for the jury. (*See* Pet. at 14, citing Pet. App. 3a.)

The government also states that "[w]hatever confusion could have arisen would, of course, have been identical had the conspiracy been charged in two counts rather than one." (Opp. at 9.) Putting aside for a moment the issue of multiplicity, *see supra*, the proposition is a dubious one. If the government had alleged the conspiracy in two counts, the prosecution, rather than the jury, would have been required to allocate the various overt acts between the unlawful objectives charged. And the government would not have been able to argue during the appeals process that certain acts, which it previously conceded to be associated only with the *bribery* objective, now support Southland's conviction on the *tax fraud* objective.

conduct which constituted the conspiracy to bribe also grounded the conspiracy to defraud, the obvious purpose of the tax charge—conceded by the government before trial—was to squeeze another year into the limitations period. This Court has not permitted such statutory manipulation, *Bridges* v. *United States,* 346 U.S. 209 (1953), and should not now.

Respectfully submitted,

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